Ready Mix, Inc. *and* Teamsters, Chauffeurs, Warehousemen & Helpers, Local 631 affiliated with International Brotherhood of Teamsters, AFL–CIO. Case 28–CA–14984

August 1, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On September 27, 1999, Administrative Law Judge Frederick C. Herzog issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified below, and to substitute a new Order for that of the judge.

1. In dismissing four allegations of violations of Section 8(a)(1), the judge relied solely on the ground that the General Counsel failed to establish that Dave Hampton was a supervisor under Section 2(11) of the Act. In adopting the judge's dismissal of these allegations, we also rely on the lack of merit in the complaint allegation, renewed by the General Counsel in his exceptions, that Hampton was an agent of the Respondent.

The Respondent is in the business of providing ready-mix concrete to construction sites. It employs employees who mix concrete and transport the concrete in trucks to the jobsite. The General Counsel contends that mixer/driver Hampton was the Respondent's agent when it assigned him temporarily to perform the duties of a "field representative" or coordinator. We find no merit to that contention because there is no evidence that performance of field representative duties is, or was perceived by employees to be, a managerial or supervisory function. As the judge found, the field representative or coordinator merely relays and helps implement customer instructions at the jobsite where cement is to be delivered. Moreover, Operations Manager Michael Ramsey testified that all driver/mixers are expected to perform such field duties if they are the first to arrive at the jobsite and can facilitate customer needs upon their arrival. Accordingly, Hampton's temporary performance of such nonmanagerial duties was insufficient to make him an agent of the Respondent.

As the judge also found, Hampton made various claims to employees that he had authority to direct work and to coordinate job tasks. There is no evidence, however, that the Respondent either conferred this authority on Hampton or cloaked him with apparent authority to act as its agent.

The Board applies common law principles of agency to determine whether an individual possesses actual or apparent authority to act for an employer, and the burden of proving an agency relationship is on the party who asserts its existence. See, e.g., *Pan-Oston Co.*, 336 NLRB 305, 305–306 (2001). "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question." *Southern Bag Corp.*, 315 NLRB 725 (1994). The test is whether, under all the circumstances, employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management. See, e.g., *Pan-Oston Co.*, supra, citing *Waterbed World*, 286 NLRB 425, 426–427 (1987), enfd. 974 F.2d 1329 (1st Cir. 1992).

Here, there is no showing that the Respondent placed Hampton in a position that employees would reasonably believe that he was acting for management. Hampton's mere claim of alleged authority is insufficient to make him an agent.[2] Nor is there evidence that Hampton was held out as a conduit for transmitting information from management to employees. Compare *Pan-Oston Co.*, supra (no evidence that employer communicated to employees that alleged agent was acting on its behalf) with *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998) (employees held to be conduits where they attended daily production meetings with top management, from which they returned to communicate management's production priorities and were the "link" between employees and upper management).

Accordingly, because the General Counsel has not met his burden of proving that Hampton was either an agent or a supervisor, we shall dismiss the 8(a)(1) allegations pertaining to Hampton.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] One of the employees allegedly threatened with reprisals by Hampton told Operations Manager Michael Ramsey that Hampton "was out to get his job." Ramsey credibly testified that he assured the employee that Hampton could not do so. Ramsey also told another employee that Hampton was not a supervisor.

2. Contrary to the judge, we find that in August 1997, the Respondent, through Operations Manager Ramsey, violated Section 8(a)(1) by interrogating an employee.

Ramsey credibly testified that he initiated a conversation in the driver's room with employee Richard Edwards. Ramsey "jokingly" asked Edwards if he had a listening device in his lunchbox. Ramsey then informed Edwards that he had "heard that you were passing out union cards." Although Edwards had been passing out union cards, he initially denied to Ramsey that he had done so. After Edwards' denial, Ramsey said, "[W]ait a second, Rick, the reason I'm saying that is because you can't do it on work time." Edwards then admitted that "I'm doing it" and Ramsey replied, "[O]kay."

As the Board found in *Continental Bus System*, 229 NLRB 1262, 1264–65 (1977), in which a manager told an employee that "I heard that you [were] getting people signed up for the Union," such a statement begs a reply. And, indeed, Manager Ramsey's statement to employee Edwards that he had "heard that you were passing out union cards" drew a reply—a false denial of union activity. Thus, Ramsey's statement was a coercive interrogation because it amounted to an invitation to Edwards either to confirm or deny the truth of Ramsey's statement. See *Debber Electric*, 313 NLRB 1094, 1098 (1994) (manager coercively interrogated employees by stating that "I guess you know that the union is trying to organize us").

In finding that Ramsey coercively interrogated Edwards in violation of Section 8(a)(1), we also note that Ramsey was a high management official, that Edwards initially felt compelled to reply to Ramsey's statement by falsely denying his union organizational activity, and that there is no evidence either that Edwards has solicited union cards openly or that he had done so during work time as Ramsey suggested.[3] *Brigadier Industries Corp.*, 271 NLRB 656 (1984), relied on by the judge, is inapposite. In that case, unlike the present case, the employee at issue was an "open and active" union supporter.[4]

Finally, we note that Ramsey's initial comment concerned Edwards' alleged passing out of union cards. It did not concern Edwards' alleged passing out of union cards during worktime. It was only after Ramsey's comment solicited a false response that Ramsey sought to narrow his comment to solicitation during worktime.

Accordingly, for the reasons above, we find that the Respondent coercively interrogated an employee in violation of Section 8(a)(1).[5]

3. The General Counsel contends that the judge erred by failing to grant its motion to amend the complaint, as set forth in its posthearing brief to the judge, to allege that the Respondent, through Operations Manager Ramsey, advised employees that it would be futile for them to support the Union. Assuming, arguendo, and without deciding, that such an amendment would be appropriate, we find that Ramsey's statements did not, in any event, constitute coercive statements of futility regarding unionization.

Ramsey was asked by employees on several occasions whether the Respondent "was union" or had "plans to go union" or was "going to go union." In each instance, Ramsey responded either that the Respondent was not unionized or had no plans to go union or to be union. Further, Ramsey did not state or imply that the Respondent intended to ensure its nonunion status through discriminatory or coercive means. In these circumstances, we find that Ramsey's answers to employees' inquiries were, in context, noncoercive statements regarding the Respondent's nonunion status and, therefore, would not reasonably cause employees to believe that efforts to

[3] We construe Edwards' reply to Ramsey as an admission that he had passed out union cards, but not that he had done so during work time.

[4] Our dissenting colleague Member Bartlett finds that during his April 1997 employment interview, Edwards asked whether the Respondent was union represented and, that during an earlier occasion when employed by another company, Edwards indicated to Ramsey that he would come to work for the Respondent if it were unionized. Contrary to Member Bartlett's suggestion, these incidents do not establish that Edwards was "openly" engaged in union card solicitations in August 1997, or was otherwise an open union adherent during the time at issue. Indeed, in his pretrial Board affidavit, upon which the Respondent cross-examined Edwards at the hearing, Edwards stated that he tried to keep his union activities a secret.

[5] Chairman Hurtgen agrees with Member Bartlett, concurring in part, that the judge correctly found that Ramsey's statement would not tend to create an impression that Edwards' union activity was under company surveillance. In the Chairman's view, at most, the statement created an impression that Ramsey had learned in some way that Edwards was engaged in soliciting cards. However, the statement does not inform the listener whether the information was obtained through company surveillance or picked up "through grapevine," i.e., overheard in casual conversations. In these circumstances, Chairman Hurtgen is unable to find that the statement, without more, conveyed the former impression.

Member Liebman would find that Ramsey's statement, in addition to coercively interrogating Edwards, also created an impression that Edwards' union activities were under surveillance. In her view, Ramsey's statement to Edwards communicated that management knows that the employee is a union organizer and that it has a source of information concerning the employee's union activities. Even assuming that the information could have been obtained "though the grapevine," as the Chairman speculates, employee Edwards would have no reasonable basis to know, or to infer, that Ramsey was merely referring to information overheard in unidentified "casual conversations." See *Continental Bus System*, supra at 1265. See also *Publishers Printing Co.*, 317 NLRB 933, 934–935 (1995) (employer created impression of surveillance when, after employee secretly commenced union card solicitations, supervisor asked employee for a union card).

serve union representation would be futile. Compare *Wellstream Corp.*, 313 NLRB 698, 706 (1994) (company president statements that no "son of a bitch" would bring a union into Wellstream and that he would see to it that Wellstream was never unionized were clearly intended to and had the effect of conveying to employees the futility of their support for the union); and *Soltech, Inc.*, 306 NLRB 269, 272 (1992) (statement that Soltech did not need a union and would do everything it could to assure the Company could run nonunion was designed to and did notify employees that efforts to secure union representation would be futile).[6]

ORDER

The National Labor Relations Board orders that the Respondent, Ready Mix, Inc., North Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union or protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in their exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix"[7] at its location in North Las Vegas, Nevada. Copies of the notice on forms provided by the Regional Director for Region 28, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since August 1, 1997.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 28, a sworn certification of a responsible official on a form provided by Region 28 attesting to the steps the Respondent has taken to comply.

MEMBER BARTLETT, concurring and dissenting in part.

I would affirm the judge's dismissal of the allegations that the Respondent, through Operations Manager Michael Ramsey, violated Section 8(a)(1) by interrogating employee Richard Edwards and creating the impression of surveillance.

As indicated in the majority opinion, the subject conversation occurred in the driver's room. Ramsey initiated the conversation, telling Edwards that he'd like to talk to him. When Edwards came into the room and opened his lunchbox, Ramsey "jokingly" asked him if he had a listening device in the lunchbox. Ramsey went on to say that he'd heard that Edwards had been passing out union cards. The judge found that Ramsey credibly testified that he did not say this to inquire about it, but merely to open the conversation and identify the subject matter of the conversation. Edwards initially responded untruthfully by denying that he had been doing so. Ramsey then said, "[W]ait a second, Rick, the reason I'm saying that is because you can't do it on work time." At that point, Edwards admitted that "I'm doing it" and Ramsey replied, "[O]kay."

The judge found that Ramsey neither unlawfully interrogated Edwards nor unlawfully created the impression of surveillance. I agree. Edwards was a known union supporter. Thus, prior to being hired by Respondent, he indicated to Ramsey that he would come to work for Respondent if it were unionized. Further, in his April 1997 employment interview, just a few months prior to the events here, Edwards had asked whether the Respondent was union represented.

In addition, Ramsey made clear that his sole reason for raising the subject of card solicitation was to make sure that Edwards did not solicit cards on worktime. As noted by the judge, this was a legitimate concern.[1] Further, at that point, Edwards admitted that he was "doing it," and Ramsey simply replied, "[O]kay." Ramsey made no threats of retaliation against legitimate or protected card solicitation activities. Nor did the conversation occur in the context of other unfair labor practices. The judge

[6] In finding that the Respondent did not violate Sec. 8(a)(3) and (1) by denying a leave of absence and reemployment to Butch Youmans, the judge noted that the Respondent did not commit any independent violations of the Act. Although we find that the Respondent also violated Sec. 8(a)(1), we adopt the judge's finding as to Youmans. In doing so, we emphasize that the Respondent sought to persuade Youmans to prolong his employment and, as the judge found, had ample reason to deny a leave of absence to an employee returning to a business competitor.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] It is well established that an employer may lawfully prohibit solicitation during working time. See *Our Way*, 268 NLRB 394 (1983).

dismissed all the other allegations of the complaint, and we have adopted the judge's findings.

In these circumstances, I agree with the judge's findings that the conversation was noncoercive and therefore did not violate Section 8(a)(1) of the Act. See *Brigadier Industries Corp.*, 271 NLRB 656 (1984); and *Rossmore House*, 269 NLRB 1176, 1177 (1984).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees concerning their union or protected concerted activities.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

READY MIX, INC.

Nathan W. Albright, Atty., for the General Counsel.
Gregory E. Smith, Atty. (*Smith and Kotchka*), of Las Vegas, Nevada, for the Respondent.
Thomas J. Corey, of Las Vegas, Nevada, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Las Vegas, Nevada, on November 3 and 4, 1998,[1] and February 18, 1999, and is based on a charge filed by Teamsters, Chauffeurs, Warehousemen & Helpers, Local 631 affiliated with International Brotherhood of Teamsters, AFL–CIO (Union), on February 3, 1998 (and subsequently amended), alleging generally that Ready Mix, Inc., (Respondent), committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (Act). On March 30, the Regional Director for Region 28 of the National Labor Relations Board (Board), issued a complaint and notice of hearing alleging violations of Section 8(a)(1), (3), and (4) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is a Nevada corporation, with an office and place of business in North Las Vegas, Nevada, where at all times material, it has been engaged in the business of a ready-mix concrete plant, manufacturing and delivering ready-mix concrete; that during the 12-month period ending February 3, in the course and conduct of its business operations, derived gross revenues in excess of $500,000; and that it purchased and received at its facility mentioned above goods, products, and materials valued in excess of $50,000 directly from points outside the State of Nevada.

Accordingly, I find and conclude that Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Around December 1997, the Union began an organizing campaign among Respondent's employees. On January 5, the Union filed a petition for an election in Case 28–RC–5595. On January 16, a preelection hearing was held in Case 28–RC–5595. During this same period of time, Respondent employed approximately 40 mixer-drivers. In January, Respondent began its campaign against the Union. An election was held on February 20, which the Union lost.[2]

B. Allegations

1. The complaint alleged the following violations of Section 8(a)(1) of the Act

a. On January 29, at a jobsite near Boulder City, Nevada, by a supervisor named Dave Hampton, interrogated employees and threatened reprisals if employees selected the Union as

[1] Unless otherwise indicated, all dates hereafter refer to the calendar year 1998.

[2] The Union filed objections to the election. For a time they were consolidated with this case for hearing. However, shortly before the opening of the trial, they were severed. Accordingly, none of the issues presented therein are decided herein.

their representative and promised them benefits if they rejected the Union.

b. In the first 2 weeks of February, by a supervisor named Dave Hampton, engaged in surveillance of employees and harassed employees by augmenting their supervision.

c. On February 20, by a supervisor named Dave Hampton, Respondent informed employees it would be futile to select the Union as their representative, disparaged its employees because of their support for, membership in, and activities on behalf of the Union.

d. In early February, by a supervisor named Dave Hampton, at a jobsite in Las Vegas, Nevada, Respondent interrogated employees, and informed employees that it would be futile for them to select the Union as their representative.

e. In August 1997, by Ramsey, Respondent interrogated employees and created the impression of surveillance.

f. On February 11, by Kenneth D. Nelson, director of corporate benefits,[3] and a vice president of Meadow Valley Contractors, Inc., Respondent promised employees that benefits would increase, terms and conditions of employment would improve, and that they would receive a 401(k) plan and improved insurance if they rejected the Union as their bargaining representative.

g. On November 6, by a written memorandum issued to employees, Respondent intimidated, restrained, coerced, and disparaged employees who had engaged in union activities and who cooperated with the National Labor Relations Board during the unfair labor practice investigation and trial herein.

2. The complaint alleged the following violations of Section 8(a)(1) and (3) of the Act[4]

a. On January 17, Respondent failed and refused to grant employee Butch Youmans a leave of absence, and since February 5 has failed to employ him, reemploy him, or consider him for employment.[5]

b. On or about January 25, Respondent issued its employee, Thomas Warburton, an unwarranted and undeserved 5-day suspension.[6]

3. The supervisory issue

Robert Morris (vice president), Michael Ramsey (operations manager), Bill Austin (fleet manager), and Kenneth D. Nelson (director of corporate benefits, and a vice president of Meadow Valley Contractors, Inc.),[7] are all admitted by Respondent to be, and to have been at all relevant times herein, supervisors of Respondent within the meaning of Section 2(11) of the Act.

The complaint also alleges that one Dave Hampton is a supervisor. Respondent denies that Hampton has, or has ever had, status as a supervisor. The issue is of considerable importance, since Hampton is alleged to have been the person who, on behalf of Respondent, engaged in the majority of conduct alleged as violative in this case. Thus, I discuss this issue first.

Hampton is employed by Respondent as a mixer/driver. Hampton, like other mixer/drivers, was placed on a seniority list for purposes of receiving overtime and other assignments. Hampton drove a mixer/truck like other drivers. Hampton was known to be a vocal antiunion voice and freely mentioned this to others, both employees and supervisors.

Respondent also employed "field representatives" or "coordinators." Their job was to visit the various jobsites, interfacing with customers and relaying the customers' needs to Respondent's dispatchers and other mixer/drivers. They served as a "point men" between the customer, dispatch, and the drivers. They could and would, when necessary, tell drivers where to place their cement on various jobs or what jobs to go to. According to employee Weber, these field representatives' duties were generally fulfilled by Respondent's two salesmen, but they could be done as well as by Austin and Ramsey.

Beginning February 2, until February 23, Hampton was assigned to drive a different type of truck, i.e., a pickup, and to fill in as a temporary field representative. When Hampton was given this temporary assignment, nothing was said about it to other employees. According to Ramsey, all that happened was that he told Hampton that he would be filling in for one of Respondent's two salesmen/field representatives, Nick Kane, who was out on medical leave, and that he (Ramsey) needed time to devote to the union campaign. Morris credibly, and logically, testified that Hampton was never selected to, or told that he would, fill in for Ramsey, but only that he'd be a field man for awhile, as a result of Kane's absence. Thus, there was a short-term vacancy which, due to competing duties, Ramsey couldn't cover for at that time. Hampton was told his position would be temporary and he was provided with an old company pickup truck, which was waiting to be sold at auction for salvage.

Employee Dan Weber testified that he was at a job at the Las Vegas Speedway in early February, and that he saw Hampton driving a company pickup truck of the sort driven by salesmen and supervisors, rather than a mixer truck. So, he asked Hampton about it. According to Weber, Hampton told him was through with mixer/drivers, and was going to drive a pickup from then on. He observed Hampton working as a coordinator on the Speedway job, and calling to find out where drivers' locations were, and letting the drivers know.

Weber also related that on February 11, at Respondent's Sundale job, Hampton told him that if he voted for the Union, he would be alienating the Company. Weber admitted that Hampton never said or otherwise indicated that he was relaying some message from either Ramsey or Morris. Weber knew from the time that the petition was filed in early January that Hampton was antiunion.

Weber also recalled Hampton told him that day that he was going to "hang" employee Louis Hayes because Hayes was

[3] Admitted at trial to be a supervisor of Respondent.

[4] At trial an additional allegation that "on or about January 17, Respondent denied access of its employee, Thomas Warburton, to Respondent's office and computer" was withdrawn.

[5] Respondent avers that Youmans announced his resignation on January 12, and that, after being denied a leave of absence on January 16, Youmans quit, and has not been rehired.

[6] Counsel for the General Counsel asserts that Respondent's actions in this latter respect violated Sec. 8(a)(4) of the Act, in addition to Sec. 8(a)(3).

[7] Per an amendment to the complaint at trial.

always showing up with wet concrete loads.[8] The "wetness" of a ready mix load is known as its "slump." Weber had previously heard Hampton complaining of Hayes' wet loads. Weber acknowledged that the wetness of the loads delivered by Hayes could be verified simply by looking at the paperwork for any particular load, which specified its desired "slump." So far as has been shown, Hayes was never disciplined on account of wet loads.

Weber admitted that neither Ramsey nor Morris ever told him that Hampton was a supervisor. He also admitted that coordinators have no authority to reassign drivers to go to other pour sites, unless it was as a result of relaying the desires of a customer. Nor, according to Weber, do coordinators have authority to warn, or to issue any discipline, that he's ever been told of. While Weber allowed as how he'd follow the instructions of coordinators at the jobsite, he also admitted that sometimes those same duties are fulfilled by regular drivers when no coordinator is present, and he'd also expect to follow the instructions of fellow drivers.[9]

According to the testimony of another employee named Richard Edwards,[10] Hampton told him in early February, that he (Hampton) had a new job. Hampton said he had a pickup truck, a radio, a phone, and he was waiting for a gas card. I said that was fine. Hampton told Edwards that he (Hampton) was going to be coordinating jobs and directing, and Edwards thereafter saw Hampton several times talking to the job superintendents to find out where trucks were needed to pour at jobsites, and then directing the trucks there. Hampton agreed that the duty was generally performed by the Respondent's two salesmen. While Edwards opined that drivers would be disciplined for failing to follow the directions of the salesmen, or Hampton, he also admitted that no one ever told him that. He also acknowledged that Hampton never claimed that he was a supervisor, and that Hampton and the salesmen were simply relaying instructions from the superintendents of the customers.

At the time Hampton was temporarily assigned to serve as a coordinator in January and February, Respondent removed Hampton's name from the mixer/driver seniority list for purposes of Saturday overtime. However, Edwards acknowledged that Hampton also drove a ready-mix truck from time-to-time during the roughly 3 weeks that he filled in as a coordinator.

According to an employee named David Feldman, on January 29, Hampton spoke to him at a jobsite in Boulder City, Nevada. Feldman recounted that Hampton told him that he was glad to be out of a concrete truck and that he (Hampton) would be supervising the job. Feldman also testified that a short time later that same day, Hampton came up to Feldman on the job and asked him what he thought about the union stuff. Feldman responded that he would go along with what the other drivers wanted. Hampton told Feldman that if employees voted for the Union, they would really alienate themselves from the Company. Feldman did not reply.

Feldman also testified that during January and February, he often heard Hampton on Respondent's radios directing the work of other drivers to and from jobsites.

Feldman also testified that on small concrete jobs, Respondent generally never sent any supervisors or engaged in oversight of such jobs. Employees simply knew what to do and did it. In February, prior to the union election on February 20, Feldman noticed that Hampton came by at least two small jobs where Feldman was working alone. In Feldman's experience with Respondent, such oversight by management was unusual. Feldman had never seen supervision on small jobs prior to this visit by Hampton. When Feldman questioned the site supervisor on that job as to what Hampton wanted, the site supervisor told Feldman he wasn't sure why Hampton was there.

Feldman testified that on February 20, the day of the election, he served as the Union's observer. He recalled that Hampton, chosen by Ramsey, served as the Respondent's observer. During the election, Hampton and Feldman took a bathroom break together. As they were headed to the bathroom, Hampton told Feldman that he (Feldman) was a dirty dog and said this was not necessary. During another bathroom break during the election, Hampton again told Feldman that this was not necessary, there was no reason for doing "this," and asked Feldman why was he doing "this."

Finally, Feldman told on an incident on February 2, in which Hampton told him that his headlights were on, and to turn them off. Feldman didn't do so. Hampton said the same thing some 10 minutes later. Feldman was never disciplined over this incident.

Ramsey testified that from February 2 to 23 Hampton was assigned "more of a—not quite full time, but more of a full time status in helpin [sic] in the field." No announcement was made to others, as he remained a driver/mixer. He was not given any supervisory authority during this time. He can't discipline, hire, fire, or commit Respondent's credit. Nor do employers in the area use field representatives for supervisory duties. I never heard that he held himself out as a supervisor, except that in a couple of instances I heard that Dave said he could get their jobs, and I told them he couldn't do that.

Based upon the evidence detailed above, I find that counsel for the General Counsel has failed to prove that Hampton possessed either the real or apparent authority of a supervisor for Respondent during any relevant time.

First of all, I note that the testimony of each of counsel for the General Counsel's witnesses is suspect, as I announced at trial, each made a poor impression for credibility. Indirect contrast thereto, I found that both of Respondent's witnesses, Ramsey and Morris, were forthright, convincing, apparently truthful, and credible. Thus, in any area of conflict, I will credit the testimony of Ramsey and Morris over that of Weber, Edwards, Feldman, and Youmans.

I further note that it is axiomatic that the authority of an agent is neither self-proving, nor properly established by the words of the alleged agent, himself.

[8] This "threat" apparently found its way to Hayes, who complained about it to Ramsey. Ramsey simply assured him that Hampton had no such authority.

[9] Ramsey credibly testified that he'd expect "any" employee to fulfill the duties of a coordinator if they were first on the job. He also credibly testified that ordinary employees do, on a regular basis, fulfill that duty.

[10] This witness was forced to admit during his cross-examination that he lied, both during his direct examination and during his conversations with management officials, regarding his union activities.

I decline to draw any inference, adverse or otherwise, from the failure of any party to call Hampton as a witness, as I have been invited to do by counsel for the General Counsel. In my opinion, the totality of the evidence shows that Hampton's interests were more closely aligned with ordinary employees than they are with management. Further, there is no evidence to even suggest that he was not equally available to either party's subpoena. Nor does it appear that he lay within the control of one party more than the other.

It is important to recall that none of the witnesses for the General Counsel has testified that any member of management ever told them that Hampton possessed supervisory authority. To the contrary, the evidence of the General Counsel's witnesses were solely upon events which equivocally suggest the possession of such authority.

For example, Weber has testified that he observed Hampton driving a truck, albeit an older one, such as those normally driven by supervisors and salesmen. Thus, he apparently inferred that Hampton was doing the job of a coordinator or field man. Yet, despite his recital of Hampton's history of complaining about the wetness of the slump delivered by some drivers, such as Hayes, he admitted that coordinators are not empowered to reassign drivers, or to warn them or to discipline them. As he testified, the coordinators are just there to relay instructions. Ramsey's testimony directly confirmed that lack of authority by the field men or coordinators, and credibly refuted any suggestion that Hampton ever succeeded in imposing discipline, as he was alleged by Weber to have threatened, upon Hayes. Thus, I find and conclude that Weber's testimony fails utterly to establish Hampton's authority as a supervisor.

Nor was Edwards' less-than-credible testimony much more substantive. As to Hampton's authority, he testified that Hampton once bragged to him about his new-found status, and that he, Edwards, "felt" that he had to obey Hampton. Yet, Edwards never testified that Hampton was expressly granted any authority by a management official of Respondent. Instead, he admitted that no one ever told him he'd be disciplined if the didn't follow instructions from Hampton. He just saw him with a pickup truck, and a phone, etc. Yet, he also admitted that Hampton carried his own phone even before these incidents. Indeed, he ultimately was compelled to admit that Hampton and the salesmen were merely relaying instructions and information from the job superintendent to the trucks, and that he'd seen Hampton perform the very same tasks even before the time when Hampton was temporarily assigned a pickup truck. Further, he observed that Hampton was performing his new duties sporadically, as he observed during the 3-week period that Hampton was assigned a pickup truck that Hampton also drove a regular ready mix truck from time-to-time. Such equivocal testimony cannot, and does not withstand, the credible and forthright testimony of Ramsey on the same subject. Thus, I find and conclude that Edwards' testimony fails to establish Hampton's authority as a supervisor.

The final unconvincing witness for counsel for the General Counsel on the supervisory issue was Feldman. As summarized above, Hampton was never specifically told that Hampton was a supervisor. He merely divined that from his observation that Hampton was driving a pickup truck, and from several incidents in which Hampton, himself, spoke of his new authority or behaved as though he was possessed of authority to discipline. Of course, none of those incidents led to actual discipline. All other "evidence" cited by Feldman consisted of his observation of Hampton "bossing" others around while serving as a field man, as other field men did, and as he'd observed Hampton do prior to the time that he started driving a pickup truck, whenever he filled in as a coordinator on a jobsite. Indeed, when faced with the prospect of discipline by Hampton, Feldman thought so little of the prospect that he ignored two explicit instructions he claims were given him by Hampton to turn off his truck's lights. Evidently just as he'd suspected, Feldman was never disciplined for having ignored Hampton's instructions. As with other witnesses on this issue, the testimony of Ramsey is far superior, and is credited in any instance of dispute. Accordingly, I find and conclude that the testimony of Feldman fails to establish that Hampton was ever possessed of supervisory authority.

As Ramsey credibly testified, Hampton has never had the authority to hire, fire, discipline, promote, transfer, layoff, reward, schedule, grant time off, reprimand, authorize overtime, prepare vacation schedules, address grievances, or charge the Respondent's credit. While Hampton may have complained about Hayes' work, it is clear that neither Hayes nor any other employee was ever disciplined as a result of any complaint by Hampton. Instead, while still punching a time clock, and collecting the same hourly wage, Hampton was told to do something more regularly than he'd done so in the past, and, as a convenience, told to use a pickup truck for a temporary period of 3 weeks, until the regular salesman returned to work following a sickness. I find that Hampton was not thereby granted any regular, non-sporadic, or substantial authority of a supervisory nature. *Brown & Root, Inc.*, 314 NLRB 19 (1994). Jobs such as those in issue, coordinators or field representatives, are generally nonsupervisory in the industry. They merely facilitate in following the instructions of the customer's job superintendent, and may even be performed by the first driver who happens to show up at the site. Where instructions are given to other workers, the instructions must be based upon more than the experience and knowledge of the craft skills necessary to operate. *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995). Instead, independent judgment must be demonstrated. *S.D.I. Operating Partners*, 321 NLRB 111 (1996).

Based on the credible evidence as a whole, I find that counsel for the General Counsel has failed to establish that Hampton was a supervisor. In light of my findings on this issue of Hampton's supervisory capacity, it follows that Respondent should not be held liable for any action taken by Hampton, and I find and conclude that the first four allegations of violations of Section 8(a)(1), as enumerated above, are, as a result, unproven. Accordingly, they should be, and hereby are, dismissed.

4. Discussion and conclusions regarding remaining allegations of Section 8(a)(1)

It is also alleged that in August 1997, by Ramsey, Respondent interrogated employees and created the impression of surveillance. Counsel for the General Counsel's evidence on this

point, adduced from Edwards, has been recited above. Respondent, through Ramsey, has denied the allegations, despite the fact that it is admitted that Ramsey did, as he was posting notices on the bulletin board, begin one conversation with Edwards by telling Edwards that he'd like to talk to him, and, after Edwards came into the drivers' room and opened his lunch box on the counter before him, ask jokingly whether he had a listening device. According to Ramsey's credited testimony, he went on to say that he'd heard that Edwards had been passing out union cards. Ramsey claimed, credibly, that he didn't say that to inquire about it, but merely to open a conversation, and to identify the subject matter of the conversation. Edwards lied and denied doing so. Then, Ramsey went on to tell Edwards that he couldn't do that on company time. At that, Edwards admitted doing so. Then Ramsey merely responded, "O.K." and went on his way.

As noted earlier, I found Ramsey to be a credible witness, and Edwards to be the opposite. Thus, I accept his version of the facts that his words to Edwards contained no explicit inquiry, but merely indicated the subject matter which Ramsey wished to discuss. However, I recognize that it is possible to interpret Ramsey's words as a sort of implicit or implied invitation to "confess," and, therefore, to serve the same purpose as a direct inquiry. Nevertheless, I find that there is no merit to this allegation. Respondent cites *Brigadier Industries Corp.*, 271 NLRB 656 (1984), in support of its argument that this "interrogation" was noncoercive. Therein it was noted that the employee questioned was a well known and open supporter of the Union, that the interrogation was not accompanied by any threats, and did not seek any response. Buttressing this conclusion is my observation that Edwards was never disciplined on account of this, and that nothing beyond legitimate work direction was spoken to him. I find Respondent's argument appropriate to the circumstances here, and further find that the allegation concerning interrogation and implying surveillance is unproven. Accordingly, I find and conclude that it should be, and it hereby is, dismissed.

It is also alleged that on February 11, by Kenneth D. Nelson, director of corporate benefits,[11] and a vice president of Meadow Valley Contractors, Inc., Respondent promised employees that benefits would increase, terms and conditions of employment would improve, and that they would receive a 401(k) plan and improved insurance if they rejected the Union as their bargaining representative.

It is not entirely clear just what evidence counsel for the General Counsel relies upon to support this allegation. I find that nothing in the record supports a finding that Respondent, through Nelson, on February 11, promised improved benefits to employees. As a result, I would ordinarily dismiss the allegation.

However, reading between the lines, it seems most likely to me that counsel for the General Counsel was actually concerned with events which occurred, if at all, on February 18, and which, if done at all, were done by Ramsey, and which, if violative, concerned threats rather than promises. At least, that's the way I interpret the General Counsel's brief, and as I will deal with this matter.

Before doing so, however, I add parenthetically, that if I am mistaken in my conclusion here, and if counsel for the General Counsel is still, as he explained in response to my question at trial, relying upon evidence of an "employer match," I would reach the same conclusion. This is so because the announcement of this benefit was clearly made in a memo to employees which long predated that Union's campaign, i.e., on December 17, 1997. Further, Ramsey's credible testimony on the issue of a discretionary grant of benefits in connection with the Respondent's 401(k) plan was the sole evidence in the case on that point. And, his testimony was to the effect that it was not up to the Respondent's discretion as to whether or not to give this benefit, but was solely dependent upon whether or not a particular profit margin was met.

Feldman seems to be counsel for the General Counsel's single source of evidence on this matter. Thus, right away, counsel for the General Counsel's allegation was in trouble, since Feldman was no more convincing on this issue than he was on the supervisory issue, above. But, in any event, Feldman did testify that at the Respondent's preelection meeting with employees someone, apparently Ramsey, told them that unknown benefits that employees had concerning a 401(k) plan would be "taken back" if the Union won the election. However, not only was it unclear just what was to be taken back, Feldman admitted that he did not even know that the employees previously had a 401(k) plan with Respondent.

I credit Ramsey's testimony on this over that of Feldman, and accordingly find that it is unproven that either Ramsey or Nelson, on either February 11 or 18, either promised benefits or threatened to "take back" benefits from employees if the Union was elected by the employees. Thus, this allegation should be, and it hereby is, dismissed.

At the resumption of the trial on February 18, 1999, the complaint was amended to allege that on November 6, by a written memorandum issued to employees, Respondent intimidated, restrained, coerced and disparaged employees who had engaged in union activities and who cooperated with the National Labor Relations Board during the unfair labor practice investigation and trial herein.

Counsel for the General Counsel relies solely upon the contents of a memorandum which Respondent admits that it distributed to its employees just a couple of days following the adjournment of the trial on November 4. That adjournment took place because, as I announced at trial, I failed to find that counsel for the General Counsel's case in chief was supported in any respect by credible evidence, and that I was, accordingly, considering dismissing it by way of a bench decision.

Counsel for the General Counsel objects to the memo's characterization of the testimony of employees as "false." In fact, the memo does advert to certain "false" evidence. According to the plain words on the face of the memorandum, the same "false" evidence was given during the first 2 days of the trial, but had failed to convince me that violations had occurred.

However, as I stated at trial, I cannot agree with counsel for the General Counsel's argument. Instead, it appears to me that Respondent did not exceed the boundaries of Section 8(c) in

[11] Admitted at trial to be a supervisor of Respondent.

describing to the employees what actions I had taken in the trial just preceding its adjournment. Accordingly, this allegation should be, and it hereby is, dismissed.

5. Discussion and conclusions of the 8(a)(3) allegations

On January 17, Youmans was refused a leave of absence, and since February 5 has not been reemployed or considered for reemployment.

Youmans testified that he'd been a member of the Union since April 1998, and had been active in getting pledge cards signed by fellow employees in the fall of 1997, and he wore a button showing his support for the Union.

Sometime before beginning his employment with Respondent Youmans had worked for Eagle Ready Mix, a competitor of Respondent's, located right across the street. He was fired from that job.

After going to work for Respondent, Youmans won his grievance against Eagle Ready Mix regarding his discharge, and wanted to collect. He mistakenly thought he had to return to Eagle Ready Mix's employment in order to do so, but there is no evidence at all that this fact was ever explained to Ramsey.

According to Youmans, he talked to Ramsey about it around January 16–18. He told Ramsey he wanted to go back and collect his money, and that he could be finished in a week or two. According to Youmans, Ramsey sort of looked at his Teamsters button, and said he'd think about it. Later that day Youmans saw Ramsey and asked again. Youmans recalled that Ramsey responded that it wouldn't be fair to the other drivers, still looking at Youmans' button, and denied the request. Thus, Youmans decided to give notice, and did so. He asked if Ramsey would hire him back and Ramsey said definitely, but he'd have to start at the bottom, without seniority. When Youmans gave notice Ramsey asked him to continue working to the end the week. Rather than do so, Youmans quit, and went back to Eagle Ready Mix.

Youmans recalled that, less than 2 weeks later, he sought reemployment by Respondent. About February 6, he spoke to Ramsey, who said to check back next week. Youmans said he'd lost his job at Eagle, for having a flat. According to Youmans, Ramsey sort of laughed, and said he knew it'd happen, and to check with him next week. But, the next week, Ramsey said he wasn't hiring drivers. Still a week later, in late February, Youmans testified that a mechanic named Bill said they needed drivers but Ramsey said no drivers were needed then. They've had no talks since, and he hasn't been offered reemployment.

Youmans admits that Ramsey told him he'd like him to stay.

Youmans claimed to have knowledge that one employee named Karl Shifflett had been granted a leave of absence due to his mother's illness, and that another, named Joe Amendolaro, got one to go out of state. Counsel for the General Counsel argues therefrom that Respondent has engaged in disparate treatment.

Ramsey's version was that he tried to get Youmans to stay with Respondent. As he recalled, he told Youmans to stay and that he didn't want to lose him. Ramsey recalled that Youmans told him that if Respondent was going Union, he would stay, but not otherwise. Ramsey testified credibly that he told Youmans that Respondent wasn't going Union, and wished him well. According to Ramsey, they agreed that Youmans would stay the rest of the week and that Friday, January 23 would be his last day. Ramsey credibly testified that he'd never rehired anyone under such circumstances. However, later in that same week, Youmans asked Ramsey for a leave of absence, and Ramsey said the answer was no if it was to go to work for a competitor.

Ramsey denied that he'd ever permitted any such process, and that, because of that, he didn't rehire Youmans when he came back seeking his old position just weeks later. He recalled that one employee, Goodall, had been given a leave of absence to attend to his sick mother, but was terminated after two no-shows.

The governing law in this case is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). There, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation.

> First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision.
>
> Second, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983).

In this case I conclude that the General Counsel has failed to make out a prima facie case that Youmans was denied a leave of absence, and subsequently was denied reemployment, because he participated in union activities during the pre-election period. Despite the timing of the denials, relatively a short time after his engagement in union activities, I cannot find that the General Counsel's case rises to the requisite level, even if I presume, as I do for purposes of this decision, that the requisite showing of employer knowledge has been made, that the employer acted as it did on account of Youmans' union activities. While the elements of timing and knowledge[12] are either evident or are conceded by Respondent, they are insufficient, by themselves, to carry the day for the General Counsel

In this case there is no evidence that Respondent engaged in independent violations of the Act. Nor is there any evidence that Respondent has a proclivity to violate the Act. Finally, there has been no demonstration of animus toward unionism, which, as shown above, is prerequisite to findings such as are sought herein.

Based upon Ramsey's credible testimony, and Youmans' admission, I find as fact that Ramsey needed employees during that week when Youmans asked for what, by all appearances, would be a leave of absence of indefinite length; yet Ramsey

[12] Given the openness of Youmans' activities and the small size of Respondent's operations, I think it is likely that Respondent had knowledge of Youmans' union sympathies.

still sought to, and apparently did, persuade Youmans to agree to stay on for the remainder of the week; only to have Youmans return a short while later asking for further concessions; whereupon, Youmans simply quit and went to work for Ramsey's competitor.

The General Counsel must establish unlawful motive or union animus as part of his prima facie case. If the unlawful purpose is neither present nor implied, the employer's conduct does not violate the Act. *Abbey Island Park Manor*, 267 NLRB 163 (1983); *Howard Johnson Co.*, 209 NLRB 1122 (1974). However, direct evidence of union animus is not necessary to support a finding of discrimination. The motive may be inferred from the totality of the circumstances proved. *Fluor Daniel*, 311 NLRB 498 (1993); *Associacion Hospital del Maestro*, 291 NLRB 198, 204 (1988). I find that counsel for the General Counsel has failed to establish this critical element of animus in this case. There are no independent violations of the Act, and there is no direct evidence of an intent to discriminate on the part of Respondent. Nor is there credible evidence of disparate treatment.

Youmans' testimony concerning having knowledge of other employees having received leaves of absence is insufficient to overcome Ramsey's credible testimony to the effect that he had never given such leaves, and that he saw no good reason to begin with Youmans. The fact that he'd granted time off to attend to an ailing mother does not belie Ramsey.

Finally, I cannot say that the circumstances of Ramsey's refusal are so unreasonable on their face as to evidence an intent to discriminate. Certainly no employer is caused to harbor kindly feelings toward an employee who leaves him, despite being told he's needed, in order to work for a close competitor. Nor is Ramsey's explanation for denying the request for a leave of absence unreasonable; in his position he would naturally be concerned that other employees would perceive granting such a request as unfair to them.

Accordingly, I find and conclude that the allegations concerning Youmans are unproven and should be dismissed.

Finally, it is alleged that Respondent, through Ramsey, suspended Warburton for 5 days on account of his union activities.

Warburton did not testify, and the only evidence concerning this matter came from Ramsey, a credible witness.

Ramsey acknowledged that Warburton attended the representation hearing on January 16, and testified there.

Ramsey also acknowledged that Warburton had, since roughly October 1997, operated another business together with employee Edwards. In doing so, Warburton worked on some of his equipment in Respondent's yard. Contrary to counsel for the General Counsel's argument, however, this was done by Warburton without Respondent's permission, and contrary to Ramsey's explicit instructions. Ramsey credibly testified that he was concerned about the possibility of civil liability for having equipment of others in Respondent's yard, and, as a result, he spoke to Warburton and Edwards on numerous occasions, telling them they could not do their jobs on Respondent's property or use its time to do so. Warburton persisted, however, even ordering parts, or taking parts from Respondent. Warburton and Edwards also persisted in discussing their business during Respondent's time. Neither was disciplined for doing so, but Ramsey spoke to them again and again, directing them not to do so.

However, in December, 1997, Ramsey noted that Warburton's truck was overturned just down the street from Respondent. Ramsey told him it was alright to take care of his truck, but not to do it on Respondent's property. Notwithstanding his instruction, when Ramsey next noticed the truck, it was on Respondent's property. Ramsey told Warburton to get it off, only to be told by Warburton that it couldn't be moved immediately, since he had to unload materials. So, Ramsey told him to unload it and get it off the premises, but did not give him a deadline. But, days later, it was still there, and by now had been dismantled to the point that it couldn't be moved.

The following month, on January 24, Respondent needed to perform some maintenance upon its equipment. However, the truck and equipment needed to do so were missing, and Ramsey surmised that Warburton had taken them to his house for his own use. Going there, he found that his surmise was correct, and that all its tools were in use. Ramsey angrily ordered Warburton to return the truck and all its equipment to Respondent's yard.

On the next work day Ramsey told Warburton that he was suspended until further notice and said he'd meet with him the next day.

Next day, feeling he'd let Warburton go on long enough not accepting his authority, Ramsey informed Warburton that he was to take a week off without pay. The next morning, Warburton telephoned to say that he quit.

Upon these facts I cannot find that there is even a remote chance that a prima facie case has been made out that Warburton's suspension was motivated by his union activities or sympathies.

Not only were Warburton's activities apparently minimal, it is not even dear which side his sympathies lay on. While he testified at the representation hearing, it is not clear what he said, or what that revealed about his sympathies.

Presuming, however, that Warburton was a strong union advocate, and that Respondent knew of such advocacy, the result would be the same. For, as with Youmans, there is absolutely no showing of animus present here.

I reject the specious argument that an employee who succeeds in flouting his employer's instructions for a time without discipline is thereby immunized against ever being disciplined. This is especially so when the conduct is continued in an especially egregious way such as taking Respondent's own equipment, needed by Respondent at its place of business, to the employee's home.

Indeed, I consider that the discipline consisted of a mere 5-day suspension, rather than discharge, to evidence a lack of animus on Respondent's part.

This allegation is totally lacking in merit, and should be dismissed.

Summarizing, I find and conclude that counsel for the General Counsel has failed to establish a prima facie case by the preponderance of the credible evidence in any respect alleged. Accordingly, the complaint shall be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated the Act as alleged.

[Recommended Order for dismissal omitted from publication.]